In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 52

RAYMOND R. BEST and WALTER E. BECK,
Petitioners,

vs.

HUMBOLDT PLACER MINING COMPANY and DEL DE ROSIER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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OPINIONS BELOW

Opinion of the District Court (R. 17-21) is reported in 185 Fed.Supp. 290.

Opinion of the Court of Appeals (R. 34-40) is reported in 293 F.2d 553.

Judgment of the Court of Appeals was entered August 18, 1961. (R. 41.)

Petition for writ of certiorari was filed December 15, 1961 and granted February 19, 1962. (R. 42.)

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where the United States has submitted to the primary jurisdiction of a Federal Court by its complaint in eminent domain, may the petitioners, as subordinate officers, lawfully treat the District Court as a mere *forum non conveniens* and institute other *in rem* proceedings against respondents when respondents are barred fom operating their mines by an outstanding writ of possession?

2. Would a plea of a burdensome trial by the District Court be sufficient to grant an additional *in rem* action as an administrative proceeding so as to deny respondents their right to a jury trial in evaluating their mining properties?

3. Would the injection of extraneous matters into a case by means of a petition for certiorari be permissible when the questions were not raised either in the District Court or in the Appellate Court by briefs or otherwise?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes relating to and governing mining locations, together with the principal regulations of the Department of the Interior governing proceedings of the character herein involved, are printed in this brief as an Appendix, to which reference is hereby made.

A brief summary of the law is set forth herein as preliminary for a more extended summation in the argument.

A mining location based upon a discovery of valuable mineral is a grant of real property to the locator by the United States and is an estate of inheritance.

30 *U.S.C.A.* 22, 26, 35;

Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 316, 74 L.Ed. 445, 449, 50 S.Ct. 103.

The Constitution provides, among other things, "nor shall private property be taken for public use without just compensation."

Amendment V.

The word "property" is addressed to every sort of interest the citizen may possess. The word "taken" is the deprivation of the former owner rather than the accretion of a right or interest to the sovereign. If the governmental action is so complete as to deprive the owner of all or most of his interest in the subject matter, it is a "taking".

U. S. v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311, 156 A.L.R. 390.

The taking possession of property under eminent domain proceedings is provided in

40 *U.S.C.A.* 258a. (See Appendix.)

The procedures under eminent domain are provided in

28 *U.S.C.A.* Rule 71A and 71A(i)(3). (See Appendix.)

The jurisdiction of the District Courts in eminent domain proceedings is provided for in

28 *U.S.C.A.* 1358.

The authority of the Solicitor of the Department of the Interior to submit to the Attorney General applications for institution of proceedings for condemnation is provided for in Order No. 2509 of the Secretary of the Interior, as published in the Federal Register July 24, 1952 beginning at page 6793 thereof.

The authority of the Solicitor of the Department of the Interior to exercise all power and authority of the Secretary thereof with respect to the disposition of appeals to the Secretary from decisions which relate to lands or interests in lands, is provided for in Section 23 of the above Order No. 2509. (See Appendix.)

We have been unable to find any statute authorizing the State Supervisor of the Bureau of Land Management to take over pending condemnation proceedings in part and transfer the jurisdiction of the Court to himself and the Bureau of Land Management while he is a defendant in a pending suit questioning his authority. To rule he can do so is tantamount to a finding he can, on his own motion, deprive the Court of jurisdiction over him, although the verified complaint on file against him alleges he is acting beyond his statutory authority.

The Regional Solicitor and Assistant Regional Solicitor, and their assistants are under the direct orders of the Solicitor of the Department and they do all the local legal work in connection with contests

and the prosecution of a Government contest before the Bureau of Land Management, acting as attorney for the Bureau and its officers. The Bureau of Land Management has no other attorney.

STATEMENT

Respondents herein, as plaintiffs, brought this action (R. 3-16) in Federal District Court to enjoin petitioners, who are subordinate officials of the Department of the Interior, from removing from the jurisdiction of the District Court an *in rem* action in eminent domain and subject the mining properties of respondents to a "contest" before its Bureau of Land Management, as filed March 17, 1960.

Respondents alleged in their verified complaint filed in the District Court that they are the owners of thirteen placer mining locations, the location notices thereof being duly recorded in the Recorder's Office of the County of Trinity, State of California. Each mining location is alleged to include lands of established and known mineral character upon which—as to each separate claim—a discovery of valuable mineral, to wit: gold, has been made and the said claims and each of them have been and are held and worked by extensive excavations for their valuable gold content, and that the value is in excess of $10,000.00.

It is further alleged that the petitioners herein, in proceeding through the medium of said contest, were acting in excess of their statutory authority therefor, and the respondents herein would be required to enter

in upon prolonged and useless litigation and submit themselves to an unlawful exercise of attempted jurisdiction on the part of the petitioners.

It is further alleged that the United States, named as contestant in said contest, is the plaintiff in the eminent domain proceedings and has selected the United States District Court as the proper forum to determine all questions involved in said contest, and that the said petitioners were invoking the power and sovereignty of the United States of America without any warrant or authority of law.

It will be noted that, among the allegations in said contest (R. 13), the petitioners claim that, so far as known to the contestant (United States), there are no proceedings pending before the Department of the Interior for the acquisition of title to or any interest in such lands on behalf of any party other than contestees (respondents herein).

The District Court granted a temporary restraining order (R. 17) on April 18, 1960, and on June 21, 1960 entered its order (R. 17) vacating and dissolving the temporary restraining order, and that the complaint be dismissed. Thereafter and on July 11, 1960 the District Court entered its summary judgment of dismissal (R. 22), stating therein that the purpose of the condemnation cases was to obtain immediate possession of the lands, and that the Government has not raised therein the issue of the validity of the mining claims concerned.

The Court of Appeals for the Ninth Circuit reversed. (293 F.2d 553.) (R. 34.)

SUMMARY OF ARGUMENT

The respondents, petitioners here, have changed their grounds for the intervention of this Honorable Court as they presented them before the Court of Appeals.

We quote from the Brief for Appellees, petitioners here, on page 5 of the brief as filed in that Court:

> "A. The purpose of the condemnation suit was to obtain immediate possession of the lands. These lands were needed for the construction of the Trinity River Dam and Reservoir. The United States alleged in the condemnation complaint that it was the owner of the lands involved and that the mining claims were invalid."

Why this paragraph was omitted in the petition for the writ of certiorari can best be explained by the petitioners themselves, or their counsel.

The eminent domain action as filed in the District Court of the United States for the Northern District of California, Northern Division, June 24, 1957 (R. 7, p. VI), numbered therein 7570, entitled *United States of America v. C. F. Starr et al.*, filed June 24, 1957 (R. 7, p. VI), and encompassed 3,583.17 acres, more or less.

The United States, as plaintiff therein, chose its forum and it brought the action to obtain not only the immediate possession of the land, but to acquire whatever title or interest the various defendants, including respondents herein, had in and to their property.

> *U.S. v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311, 156 A.L.R. 390.

When the United States filed the suit, it submitted itself to the jurisdiction of the Court for all purposes in connection with the litigation, and the District Court should have proceeded to the determination of all questions involved, even though the case may have resulted in a judgment against the United States.[1]

The power and authority of the United States in Eminent Domain proceedings is as broad as the Constitution itself—and it cannot be controlled or defeated—by any other authority.[2]

The immediate issuance on June 27, 1957 of a writ of possession placed the United States in sole and exclusive possession of all of the lands involved herein to the absolute exclusion of respondents.

Why the delay of two years, nine months and twelve days, is not explained, particularly when petitioners urge the vital necessity of the Bureau of Land Management proceedings.

The Bureau of Land Management could not determine any question relating to the lands involved on any date later than June 27, 1957—that being the date when the United States entered into full possession of the lands.[3]

The United States was here proceeding in the condemnation suit against a *grant* by the United States,

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[1] *U. S. v. The Thekla*, 266 U.S. 328, 339-341, 45 S.Ct. 112, 69 L.Ed. 313;
Jones v. Watts, 142 F.2d 575, 577, 173 A.L.R. 240 (cert. den. 323 U.S. 787, 65 S.Ct. 310, 89 L.Ed. 628.

[2] *U. S. v. Carmack*, 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 209.

[3] *U. S. v. Dow*, 357 U.S. 17, 20-21, 78 S.Ct. 1039, 1041-1044, 2 L.Ed. 2d 1109.

and not a mere *lease* wherein the fee title to the land belonged to the United States and the lease authorized the United States to revocation upon presentation of a notice of cancellation.[1]

In the case of *Cameron v. U. S.*, 252 U.S. 450, it will be noted that this Honorable Court at the outset was careful to state that Cameron went into the Land Office proceedings *without objection* and thus submitted himself to its jurisdiction. The only point before the Court for decision was whether Cameron could relitigate a question of fact that he had agreed could be litigated in the Land Office proceedings.

Thirty-six years later a case came before the Department of the Interior where timely objection to the hearing was entered at the outset by counsel for the contestee. The Secretary of the Interior decided[2] that in a contest involving a mining location, a hearing before the Manager was not authorized by law, and the Department was required to conform to the Administrative Procedure Act.

We have been unable to find any statute authorizing a purely administrative agency to intervene in pending litigation before the Courts, and in the name of the United States lift the case from the Federal Court and itself take jurisdiction over the subject matter.

Further, we submit that the Department of the Interior, being a mere administrative body not bound

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[1] *U. S. v. 93.970 acres*, 360 U.S. 328, 329, 79 S.Ct. 1193, 1194, 3 L.Ed. 2d 1275.

[2] *U. S. v. O'Leary and Moore*, 63 I.D. 341.

by its own decisions, is not authorized by any federal rule of civil procedure or of practice, or by any statute of Congress, to determine the question of its own jurisdiction or any question of law or any question of mixed law and fact, such as would be encountered here.

As pointed out in the decision of the Court of Appeals in this case and as admitted by petitioners in their reply brief before that Court, the Solicitor for the Department is the official at whose direction the condemnation action herein was filed by the Attorney General on behalf of the United States, and in which it is alleged that appellants' mining claims are invalid. Further, the Solicitor may exercise all of the authority of the Secretary of the Interior with respect to the disposition of appeals to the Secretary from the decisions of the Director of the Bureau of Land Management or his delegates.[6]

A subordinate of the Solicitor of the Department is the prosecuting attorney in hearings before the Bureau of Land Management, and a Hearing Examiner may not, at his peril, disregard suggestions of the prosecutor when that person is the subordinate of the supreme court of the Department of the Interior. At least it has not happened during the six years last past.

Since the Solicitor of the Department has already prejudged the status of the mining claims involved, he would not reverse himself in any mere contest.

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[6]Order No. 2509, 17 F.R. 6794, Sec. 23.

THE CASE OF PETITIONERS

A. To cite a single phrase or sentence out of text of a Court decision as authority for a point advanced as germane to and controlling the major premise of the cause being submitted to the Court is not only specious, but burdens the Court and opposing counsel with the herculean task of reading a plethora of words to no productive end.

If there is a statute or a decision that authorizes a purely administrative agency such as the Bureau of Land Management to lift out of the jurisdiction of a federal court an action in eminent domain under a claim of primary jurisdiction, respondents will welcome the citations.

And if this may be done without first petitioning the Court so to do, we respectfully request the citation that states such a bureau is supreme over the federal courts.

To cite decisions of this Honorable Court or of lower courts in cases involving the Interstate Commerce Commission, Civil Aeronautics Board, National Labor Relations Board, Federal Power Commission, and similar independent agencies, as controlling here is to lift a purely administrative agency to a commanding position neither justified nor legalized by any statute of Congress.

If the Bureau of Land Management is vested with the power and authority so to arbitrarily take over pending litigation from a Federal District Court, then the reviewing authority granted by the Administrative

Procedure Act would be nullified by rule of the agency.[7]

THE CLAIM OF HARDSHIP

B. For the first time in the course of this litigation, petitioners have raised the point of hardship in that divers, countless suits in the courts now hang in space with the Bureau of Land Management unable to arbitrarily subject them to an alleged hearing prior to judgment in prior initiated eminent domain proceedings.

In an appendix to their brief filed in August, 1962, we have a full page of "hardship" cases. This heart-rending list is amplified on pages 34 and 35 of that brief.

This "Little Eva" story with all its pathos was not submitted to the District Court nor to the Appellate Court.

It, like Little Eva, "just growed". It had no parent and no sponsor, and since it was no part of the record submitted to the Courts below nor argued by petitioners, it has no place here.

Further, it is no argument to say that the ruling in the Appellate Court will delay other similar cases. The instant case of eminent domain has been pending in District Court since June 24, 1957 (R. 7, p. VI), and not the slightest effort has been put forth by the Federal Government to proceed to trial, although re-

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[7] 5 U.S.C.A. 1009(a).

spondents have been barred from operating their properties.

ATTACKS ON OUR TRIAL JUDGES

To label, by indirection, the many fine trial judges of our Federal District Courts as inept incompetents incapable of trying mining cases is an unwarranted aspersion upon their learning, their experience and their devotion to their respective positions.

With nearly forty-five years of trial practice as a background, this counsel is justified in his resentment of the inferences.

No federal trial judge this counsel has ever known was or is inferior in ability to any hearing examiner in the employ of the Department of the Interior.

It is a wholly fatuous postulate to set up in argument that only the Bureau of Land Management has the necessary "expertise" to pass upon or determine the value of the mines of respondents. There is no proof (beyond self-serving declarations) that the Bureau has any employes trained and experienced in mine operation. Merely because a person has a degree in mining engineering does not make him an executive capable of operating a mine at a profit.

The "expertise" available in evaluating mines or mining locations are not all on that Department's pay roll. There are many paying mines in the United States staffed by able, capable and experienced mining and metallurgical engineers, but it is extremely doubtful if any one of them could qualify for their respec-

tive positions as "prudent" men under the definition of the Interior Department. However, they make their properties pay a profit.

Illustrative of the opinion held by the Department of its "expertise" is the decision of the office of the Solicitor of that Department. We cite *Ex Parte Fred and Mildred M. Bohen, et al.*, 65 I.D. 65, 67:

> "It is not incumbent on the personnel of the local offices to advise claimants in detail how to assert their rights and while the Department would frown on a deliberate attempt on the part of Bureau personnel to mislead an applicant with respect to the requirements of any particular procedure, no such showing has been made here. It is well settled that the Department is not bound by erroneous advice given by its employees and that one who acts on such advice acts at his peril."

CITATIONS NOT AVAILABLE TO RESPONDENTS

C. On page 33 of petitioners' brief we are cited to a publication of the Bureau of Land Management, Department of the Interior: *The Manual of the Bureau of Land Management.*

This manual is said to contain rules and regulations governing evidence and procedure in hearings.

The manual is available only to Department employes and attorneys of the Attorney General's and Solicitor General's office. This manual is super-confidential and the public, including opposing counsel, is denied access to it. Counsel for respondents has repeatedly been denied the right to see and examine it, with the statement such denial is pursuant to direct

orders from the Bureau offices at Washington, D. C., as it is solely for official use and plainly labeled "*CONFIDENTIAL*".

Under such denial, respondents would not be afforded a "fair and open hearing" before the Department and it would be a denial of the right "to know the claims of the opposing party and to meet them."[1]

It is useless to base any facet of this case upon any decision of the Department of the Interior. Said Department is not bound by its own rules nor its own decisions. *Res judicata* is not recognized in the Department. It has stated in many, many cases that it is not bound by the doctrine of *stare decisis*.

CHARACTER OF A MINING LOCATION

A mining location is a grant from the United States and is an estate of inheritance.

Wilbur v. U. S., 280 U.S. 307, 316, 50 S.Ct. 103; *Forbes v. Gracey*, 94 U.S. 762, 24 L.Ed. 313.

The owner of a mining claim, as long as it is a subsisting matter of record and not invalidated, owns all of the claim or location and is vested with the exclusive right of possession.

El Paso Brick Co. v. McKnight, 233 U.S. 250, 257, 58 L.Ed. 943, 947.

He never has to obtain a patent.

Clipper Mining Co. v. Eli M. & M. Co., 194 U.S. 220, 48 L.Ed. 944.

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[1] *Morgan v. U. S.*, 304 U.S. 1, 18-22, 58 S.Ct. 773, 776-778, 82 L.Ed. 1129.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated, Sacramento, California,
September 19, 1962.

Respectfully submitted,
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Attorney for Respondents.

(Appendix Follows)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

RAYMOND R. BEST and WALTER E. BECK,

Petitioners

v.

HUMBOLDT PLACER MINING COMPANY and
DEL DE ROSTER

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

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